W004

IN THE SUPREME COURT OF FLORIDA

ANTHONY LLOYD STEEL,

Petitioner,

v. CASE NO. 81,437

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

With the following additions, the State adopts the Statement of the Case and Facts as advanced by the Petitioner:

1. One of the prior convictions used in habitualizing the Petitioner was for attempted first degree robbery in New York. (Appendix X).

2. The other felonies used for habitualization were possession of a firearm by a felon in Florida (Appendix II) and sale of a controlled substance in New York (Appendix VIII).

3. The instant offense is robbery with a deadly weapon (Appendix XIII). The Petitioner was sentenced as an habitual felony offender in accordance with the provisions of §775.084 Fla. Stat. (Appendix XV).

SUMMARY OF ARGUMENT

The invalid provisions of the 1989 habitual offender statute do not apply to violent habitual offenders such as the Petitioner. If, however, this cause is remanded for resentencing, the court should be afforded the opportunity to order a departure sentence, for nothing in the record indicates the court previously considered departing.

ARGUMENT

THE PETITIONER WAS PROPERLY SENTENCED AS A VIOLENT HABITUAL FELONY OFFENDER.

Pursuant to §775.084(1)(b)1c Fla. Stat. an habitual violent felony offender is one who has been previously convicted of an attempted robbery. The instant defendant was convicted for said crime on April 6, 1987, in New York (Appendix X). It was utilized by Florida in his 1991 sentence under the habitual offender statute.

Non-Florida convictions have been authorized to support a violent habitual sentence since 1988. Canales v. State, 571 So. 2d 87, 88 (Fla. 5th DCA 1990). It is clear from the four corners of the statute that the legislative intent is to treat violent habitual felons differently than non-violent habitual felons. As a result, the in-state conviction limitation that applied to habitual offender status prior to the invalid 1989 amendment has no application to habitual violent felony offenders. Bunch v. State, 18 Fla. L. Weekly D1642 (Fla. 5th DCA, July 23, 1993).

Should this court find otherwise, however, the trial court should be allowed to give a departure sentence. This is so because the court reasonably believed that it was properly sentencing the defendant as a violent habitual felon, and there is no indication in the record that the court considered its sentence to be a departure from the guidelines. Since the trial judge did not have the opportunity to consider reasons for departure initially, it would be proper for said reasons to be considered on remand. State v. Betancourt, 552 So. 2d 1107 (Fla. 1989).

The defense argues that to allow a departure sentence on remand would violate the rule of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). This reasoning is incorrect. Since the court has already indicated its desire to enhance the defendant's sentence under the habitual offender statute, if the cause is remanded for resentencing, it cannot be viewed as vindictiveness for the court to depart upward upon consideration of appropriate reasons.

CONCLUSION

Based on the aforestated points and legal authorities, the Respondent, THE STATE OF FLORIDA, respectfully requests this court to affirm the decision of the District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing ANSWER BRIEF has been furnished by U.S. Mail to Ronald E. Fox, Attorney for Petitioner, P. O. Box 319, Umatilla, FL 32784, on this 6th day of August, 1993.

BARBARA ARLENE FINK
ASSISTANT ATTORNEY GENERAL